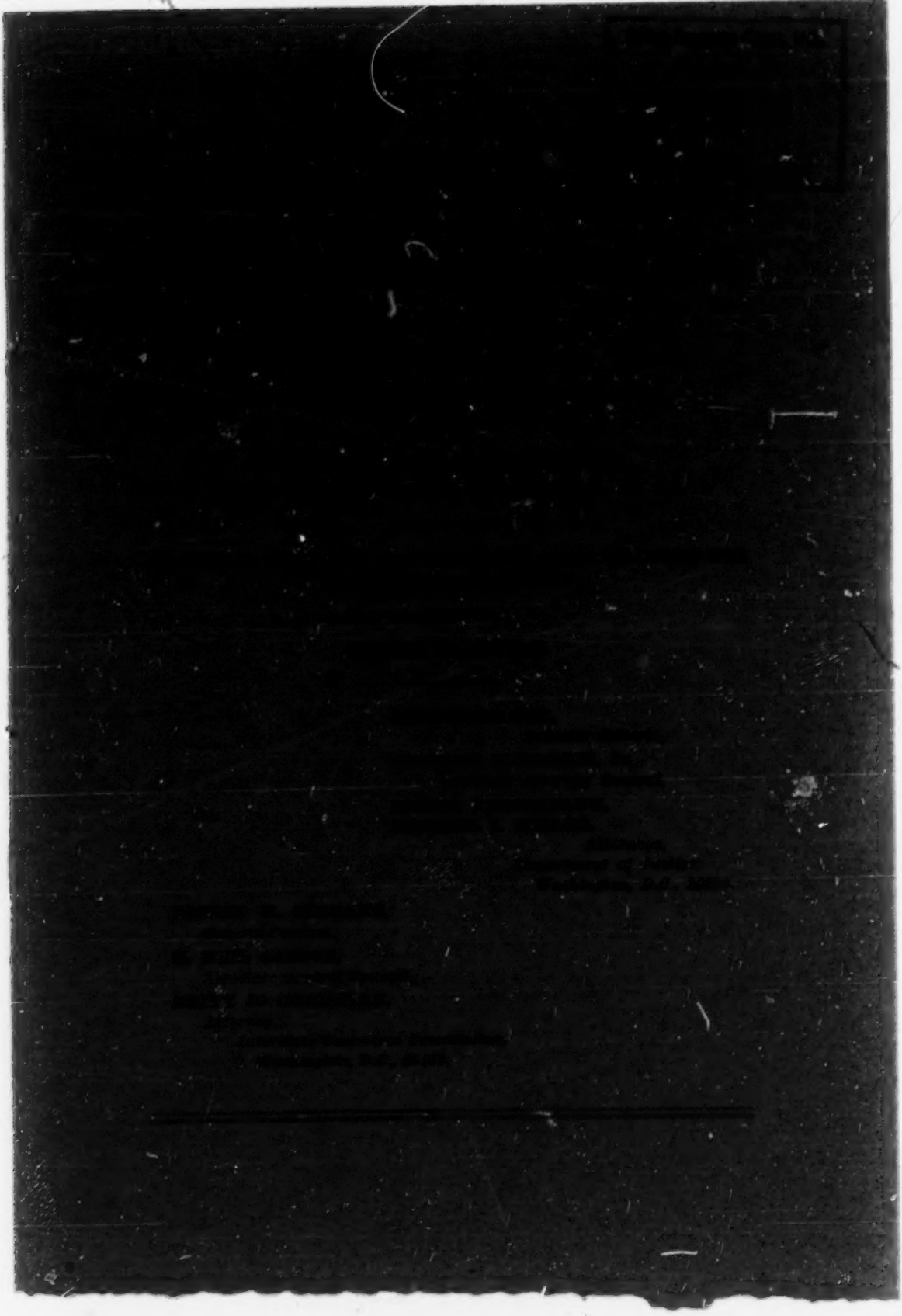

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 771

PORT OF BROOKINGS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission. Appellee, W. R. Chamberlin & Co., is a contract water carrier authorized to transport lumber from Crescent City, California, to other points. The Commission determined that appellants had failed to

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establish that the ancillary motor carrier operations of Chamberlin between Crescent City and Brookings, Oregon, are unlawful since Brookings was not shown to be beyond the scope of Chamberlin's terminal area. The Commission's order also applied to a tariff issued by Foss Launch and Tug Co. of Seattle, Washington.

Section 202(c)(1) of the Interstate Commerce Act, 49 U.S.C. 302(c)(1), partially exempts from regulation the motor carrier operations of water carriers subject to Part III of the Act, "in the performance within terminal areas of transfer, collection, or delivery services." The Act does not define the phrase "terminal area" and the Commission has not promulgated any general rule to establish the maximum permissible limits of the terminal areas of water carriers as a group.[1] Instead, it has viewed the matter as a factual question to be determined on a case by case basis.

The present proceeding arose in October 1961, when appellant Sause Bros. Ocean Towing Co., Inc., a competitor of Chamberlin, filed a complaint with the Commission charging that Chamberlin was transporting lumber by truck from Brookings, Oregon, to Crescent City, California, without the requisite operating authority from the Commission. Chamberlin admitted conducting the described operations, but justified such operations as a bona fide collection, delivery, and trans-

[1] The Commission in *Commercial Zones & Terminal Areas*, 54 M.C.C. 21, defined the terminal areas of motor carriers and freight forwarders as being coextensive with the commercial zones of the municipalities served by them. In contrast to this, no general rule has been established to define the terminal areas of rail carriers or water carriers.

fer service within its terminal area of Crescent City. Subsequently, the Commission instituted an investigation into the lawfulness of Chamberlin's rate schedules and motor carrier operations pertaining to its terminal services at Crescent City, and the issues were determined in a consolidated proceeding.

The Commission (Division 1) concluded that the complainants had failed to establish that the Port of Brookings is not within the permissible limits of Chamberlin's terminal area of Crescent City.[2] Noting that "questions concerning the maximum permissible limits of the terminal areas of such carriers must be determined upon the facts in each case" (J.S. 30), the Commission undertook a detailed scrutiny of the geographic and economic characteristics of the region involved. The Commission found that the entire coastal area of southern Oregon and northern California is sparsely populated, with Brookings and Crescent City being the principal communities (located approximately 30 miles apart), each possessing a population of less than 3,000 (J.S. 36). The principal commercial activity is the manufacture and shipment of lumber (J.S. 36). Among the major factors which the Commission considered as indicative of the close commercial relationship between Brookings and Crescent City were that Crescent City has the only airport and only oil storage terminal for the area; that southern Oregon shippers contributed financially to the building of the port at Crescent City and have

[2] The Commission did, however, require Chamberlin to file a new tariff and schedule clearly defining the limits of their terminal area at Crescent City.

used this port for the water transportation of lumber for many years;[3] and that many residents of Oregon are employees of lumber mills in California and vice versa (J.S. 33). The Commission also noted that the Port of Brookings has no public dock facilities,[4] and that self-propelled, deep-water vessels cannot safely enter its harbor (J.S. 33),[5] while Crescent City is a deep-water port which has a large public and two private docks. The Commission pointed out that Chamberlin, as a contract carrier of only one commodity, lumber, cannot interline with motor common carriers, so that a narrow construction of its terminal area "would render its services entirely dependent on motor transportation" of others and "destroy the flexibility" of its operations (J.S. 33, 34).

On review, the three-judge district court affirmed the Commission's order, and held that the Commission's decision "is supported by substantial evidence and is not arbitrary or capricious" (J.S. 39).

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[3] Shippers located in the Brookings area have long relied on the port at Crescent City for water transportation, hauling their lumber to the port in private carriage in most instances (Tr. 40, 44, 144, 248).

[4] Inadvertently the Commission stated that the Port of Brookings is not a public port (J.S. 33). This is not quite accurate. The port is public, but the dock facilities are privately owned and controlled by appellant Sause Bros., the only carrier which has carried lumber out of Brookings for the past five years.

[5] Admittedly some shallow draft vessels can enter the harbor, but the Commission, in referring to self-propelled vessels, obviously meant deep water vessels of the type used by Chamberlin. The record before the Commission is clear that vessels of the type used by Chamberlin cannot safely use the harbor at Brookings (Tr. 139–140).

ARGUMENT

1. The Commission has consistently viewed the precise scope of a terminal area, within which motor carriage may be conducted by a water carrier pursuant to Section 202(c), as a question of fact, to be determined on a case by case basis. Under Section 202(c)(1), a terminal area is the terminal area of a *carrier,* rather than of a city or a port. The factors which the Commission considers include the geographic, economic, and industrial characteristics of the area involved, and the nature of the carrier's authority and operations. The ultimate issue is whether, in a given factual context, a water carrier's motor operations may properly be considered as a "collection, delivery, and transfer service" incidental to its water carrier operations (J.S. 30). The unusual facts of this case, including the sparse population of the region, the undeveloped character of the Port of Brookings as compared with the port at Crescent City, and Chamberlin's status as a contract carrier of only one commodity, plainly distinguish it from the cases relied upon by appellants and justify the Commission's conclusion that Crescent City and Brookings were a common community and that Chamberlin was conducting a collection service incidental to its water carrier operations. *Sea-Land Service, Inc.* v. *United States,* 222 F. Supp. 558, 565 (D. Del.).

In analogous situations in which the Commission's adjudication of a similar claim (the territory served by an applicant for a grandfather motor certificate) has been challenged, this Court has stated that "[t]he precise delineation of the area or the specification of

localities which may be serviced has been entrusted by the Congress to the Commission." *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 480. The district court, after reviewing the record, concluded that the Commission's determination that Brookings was not shown to be beyond Chamberlin's terminal area at Crescent City "is supported by substantial evidence" (J.S. 39). There is no occasion for further review of this factual issue. *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

2. There is no issue of port discrimination involved in this case. The Commission's decision is limited to determining the maximum permissible terminal area of the particular carriers whose operations were challenged. Its decision is not *res judicata* as to the terminal area of other water carriers serving Crescent City, nor of a future determination of Chamberlin's terminal areas when and if the character of the region and the ports should undergo substantial changes.

Furthermore, appellants cannot show any legally cognizable injury resulting from the diversion of traffic from Brookings. Section 305(e), 49 U.S.C. 905(e), prohibits "unjust discrimination" against any port district by a *common* carrier by water. We assume *arguendo* that Section 309(g), 49 U.S.C. 909(g), by its reference to the National Transportation Policy, may similarly forbid *contract* carriers from unlawfully discriminating. These prohibitions, however, come into play only if the carrier discriminates in serving both the point preferred and the point prejudiced. See

United States v. *Illinois Central R. R.*, 263 U.S. 515; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 218 F. Supp. 359 (N.D. Ill.). In this case Chamberlin, while having authority to serve Brookings as a water carrier, was unable to do so because of the nature of the vessels it operated (J.S. 27–28, 33–34). In these circumstances, it is plain that the diversion of traffic from Brookings is not attributable to a discrimination effectuated by Chamberlin, but solely to its competitive efforts to draw additional traffic to the port which it serves.

CONCLUSION

For the above stated reasons, we respectfully submit that the judgment of the district court should be affirmed.

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